Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

STEVEN RADLOFF,

Petitioner,

vs.

CITY OF OELWEIN, JESSIE PAUL, JOHN REEG, and CURT WILKINSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a police officer's observance of a minor drinking alcohol inside a home (a nonjailable offense) support an objectively reasonable belief that multiple warrantless night entries and searches of the home would not violate the Fourth Amendment.

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

STEVEN RADLOFF, an individual on behalf of himself.

CITY OF OELWEIN, a municipal corporation.

JESSIE PAUL, an individual on behalf of himself and in his official capacity.

JOHN REEG, an individual on behalf of himself and in his official capacity.

CURT WILKINSON, an individual on behalf of himself and in his official capacity.

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CITATIONS OF REPORTS OF OPINIONS ENTERED IN THIS CASE

Radloff v. City of Oelwein, 380 F.3d 344 (8th Cir. 2004). Appendix 1-9.

Radloff v. City of Oelwein, 284 F. Supp. 2d 1145 (N.D. Iowa 2003). Appendix 12-28.

BASIS FOR SUPREME COURT JURISDICTION

The Court of Appeals for the Eight Circuit entered its judgment on August 17, 2004. Appendix 10. Petitioner Steven Radloff seeks a review of that judgment on a writ of certiorari.

The present petition is timely filed under 28 U.S.C. § 2101(c) and under Rule 13.3 of this Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review on a writ of certiorari the judgment of a federal court of appeals.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Constitution of the United States, Amendment IV.

STATEMENT OF THE CASE

During the evening of May 12, 2000, Oelwein police officers arrived at the residence of Steven Radloff after

receiving a report of juvenile drinking. Appendix 14. Oelwein police officer Jessie Paul observed Brian Goede, an individual known by Officer Paul to be underage, drinking a beer in the residence. Appendix 15. Mr. Goede, who Officer Paul knew did not live at the residence, had committed the crime of being underage in possession of alcohol, a simple misdemeanor under Iowa law. A first offense is punishable by a $100.00 fine and a second offense is punishable by a $200.00 fine and suspension of driving privileges for up to one year. Iowa Code § 123.47(3). Mr. Goede was the only person that any of the officers observed drinking that night.

Officer Paul approached the residence and attempted to enter, but was stopped by Mark Radloff, Plaintiff's 20-year old son. Mark Radloff insisted that Officer Paul have a warrant before entering. Officer Paul entered the residence despite the fact that he did not have an arrest warrant for Mr. Goede or a search warrant to enter and search the Radloff home. Appendix 15-16. The Officers testified that they could have, but did not obtain a search warrant.

After entering the residence, Officer Paul heard a noise in the garage. He opened the garage door and saw Mr Goede run from the garage to outside. Although the minor whose consumption of alcohol was the basis for the entry into the house had left, Officer Paul proceeded to search the house. First defendant Paul entered Mr. Radloff's bedroom, where Mr. and Mrs. Radloff were in bed. Appendix 16. Mr. Radloff, who has owned his home for 30 years, and had never had a prior run in with the law, asked Officer Paul what he was doing in the Radloff house. Officer Paul did not say a word and gave no indication as to what he was doing in Mr. Radloff's bedroom during the

middle of the night. Appendix 16. Mr. Radloff ordered Officer Paul to get out of his house. Officer Paul did not leave the house, however. Officer Paul then left the bedroom and continued to search the house. Appendix 16. Oelwein police officer John Reeg eventually entered and searched the residence as well.

The Officers ultimately went outside. After the Officers refused to leave, Mr. Radloff called Officer Paul a "fat fucking pig," among other things, and indicated that he would sue him. Appendix 17. Mr. Radloff and his family testified that he did not go outside the house that evening. Officer Paul and Oelwein police officer Curt Wilkinson then attempted to again go inside the residence. Mr. Radloff informed the officers that they could not reenter his house without a warrant. Officer Wilkinson responded that the Officers did not need a warrant because they were investigating a crime. Appendix 17. Mark Radloff stepped in front of the door and told the officers that they could not reenter the house, but Officer Paul threatened Mark Radloff by stating that if he did not get out of the way, Mark would be arrested for interference. Appendix 17. Officers Paul and Wilkinson entered the home and arrested Mr. Radloff using force that Mr. Radloff believed to be excessive. Appendix 17. Mr. Radloff ultimately pleaded guilty to providing alcohol to minors.

The Officers each testified that:

– They did not further search the house after the arrest and no evidence was seized from the house.

– They could have but did not obtain a search warrant.

– They did not have consent to enter or search the residence.

– They were not confronting a life threatening situation or an emergency, and there was no imminent risk of harm to anybody.

– They had not witnessed a felony.

– They had no reason to believe that Mr. Radloff was armed or had access to a firearm.

Following the illegal entry and search of his home, Mr. Radloff brought an action against the City of Oelwein and Officers Paul, Reeg, and Wilkinson alleging that the Officers violated Mr. Radloff's Fourth Amendment rights as a result of the warrantless entry and search of his residence and resulting from the use of excessive force in effectuating his arrest. Officers denied liability and raised the affirmative defense of qualified immunity. The Officers moved for summary judgment citing as an exigent circumstances noise, and that Mr. Radloff retreated into his house. The district court concluded that with probable cause to believe that there was underage drinking inside the house, the officers were permitted to enter Mr. Radloff's residence without a warrant. (Appendix 22). The district court stated that an objectively reasonable officer could have concluded that there was a risk that evidence could be destroyed or concealed, or that there was a threat to the lives of juveniles as a result of underage drinking. The district court thus granted summary judgment in favor of the Officers with respect to the unlawful entry and search claim.

At trial, the jury reached a defense verdict on the excessive force claim. A timely appeal followed the district court's denial of Plaintiff's new trial motion. On appeal,

the Eighth Circuit Court of Appeals affirmed the grant of summary judgment, finding that a reasonable officer could have believed that the entry into the Radloff home was supported by exigent circumstances. (Appendix 5). The appeals court determined that exigent circumstances existed both because of loud noise and the threat of public safety if the juveniles left the home while under the influence of alcohol. (Appendix 6).

Mr. Radloff asks that this Court grant his petition for a writ of certiorari to conform the Court of Appeals decision to existing Supreme Court authority, and to correct a result that if undisturbed, will lead to unreasonable government invasion of private homes.

ARGUMENT

A. The Court of Appeals' Decision fails to Follow Supreme Court Precedent and the Proceeding Involves a Question of Exceptional Importance, in that the Result, if Undisturbed, Will Lead to a Significant Erosion of Citizens' Right to Be Free From Unreasonable Government Intrusion Into Their Homes.

Based on clearly established law, and based on the information possessed by the Officers on May 12, 2000, a reasonable officer would not have believed that the warrantless entries and searches of Mr. Radloff's home were lawful. *See Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) (The "relevant question . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly

established law and the information the searching officers possessed.").

It was clearly established on May 12, 2000 that at the very core of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 5 L. Ed. 2d 734, (1961). The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" and the warrant requirement is a principal protection against intrusion into the home. *Welsh v. Wisconsin*, 466 U.S. 740, 748, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) (citations omitted). The Supreme Court has consistently held that absent consent or exigent circumstances, the entry of a home to conduct a search or to make an arrest is unreasonable. *See Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Kirk v. Louisiana*, 536 U.S. 635, 122 S. Ct. 2458, 153 L. Ed. 2d 599 (2002) (per curiam). It is a basic principle of Fourth Amendment law that a warrantless search of the home is presumptively unreasonable. *Payton*, 445 U.S. at 590. Allowing a warrantless invasion into a home "is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when it is accomplished under statutory authority and when probable cause is clearly present." *Id.* at 589. Probable cause to believe that a serious crime has been committed does not create such an exigency. *Id.* at 745. Likewise, absent consent or exigent circumstances, a police officer may not legally search for a subject (even if the officers have an arrest warrant for the subject) that is in the home of a third party. *Steagald v. United States*, 451 U.S. 204, 205-06, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

The police bear a "heavy burden" when attempting to demonstrate an urgent need that might justify a warrantless search or arrest, and the exigent circumstances exception to the warrant requirement is "narrowly drawn." *Welsh*, 466 U.S. at 750. An important factor in determining whether an exigency exists is the gravity of the underlying offense. *Welsh*, 466 U.S. at 753. Exceptions to the warrant requirement are "few in number and carefully delineated." *Id.; see also Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.") Courts will be particularly hesitant to find exigent circumstances where the underlying offense for which there is probable cause is relatively minor. *Welsh*, 466 U.S. at 750.

In *Welsh*, the petitioner lost control of his vehicle, swerved off the road and came to a stop in a field. The petitioner left the scene. A few minutes later, a police officer arrived. A witness informed the officer that the petitioner had either been very inebriated or very sick. The officer learned that the vehicle was registered to petitioner and determined that petitioner's residence was within walking distance. The officer proceeded to Petitioner's house, and without obtaining a warrant the officer entered the house. Upon finding petitioner in his bed the officer arrested petitioner. Petitioner was taken to the police station where he refused to submit to a breath-analysis test. *Id.* at 742-43. Based on Wisconsin's implied consent laws, petitioner's license was suspended. The Wisconsin Court of Appeals determined that the warrantless arrest of petitioner in his home was unreasonable because the state had not established the existence of

exigent circumstances and vacated the suspension. The Supreme Court of Wisconsin reversed the court of appeals finding three factors that it considered to be exigent circumstances: the need for hot pursuit of a suspect, the need to prevent physical harm to the offender and the public, and the need to prevent destruction of evidence. *Id.* at 747-48.

The Court found that the proffered exigencies did not justify the warrantless entry into petitioner's home to arrest him for a "minor" offense. The "minor" offense at issue in *Welsh* was operating a vehicle while intoxicated which was punishable by a maximum $200.00 fine for a first offense and punishable by imprisonment of up to a year and a fine up to $500.00 for a second offense. *Id.* at 747. The law discussed above was clearly established.

The information possessed by the Officers in the present case included the knowledge that the Officers could have but did not obtain a search warrant, that the Officers did not have consent to enter or search the residence, that they were not confronting a life-threatening situation or an emergency, that there was no imminent risk of harm to anybody, that the Officers had not witnessed a felony, and that the Officers had no reason to believe that Mr. Radloff was armed or had access to a firearm.

In light of the clearly established law, and based on the information possessed by the Officers, a reasonable officer would not have relied on any of the exigencies advanced to justify the warrantless entry and search of Mr. Radloff's residence. Officer Paul was not in pursuit of anyone when he initially entered and searched the Radloff residence, and a fact dispute exists as to whether Mr.

Radloff ever stepped outside the house that evening. The officers therefore cannot rely on a "hot pursuit" exigency. Likewise, the risk of losing evidence of a minor offense is insufficient to make it reasonable to make a warrantless entry into a dwelling. *Welsh*, 466 U.S. at 745-56; *United States v. Banks*, 540 U.S. 31, 124 S. Ct. 521, 527, 157 L. Ed. 2d 343 (2003).

The alleged "loud noise created by the party" did not amount to an exigency that would justify a warrantless entry or search either. The Court has never recognized a "loud noise" exception to the warrant requirement. Authority for the "loud noise" exception recognized by the Eighth Circuit would appear to come from *United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996), a case cited by the Officers. In *Rohrig*, officers received a complaint during the early morning hours of a loud noise emanating from a residence. Music was being played so loud from the residence that officers were able to hear the music while they were a block away. *Id.* at 1509. Once the officers arrived, between four and eight neighbors emerged in their pajamas to complain about the noise. The officers approached the house and then repeatedly banged on the front door, but got no response. The officers then went to the back of the house where only an unlocked screen door prevented access to the residence. The officers again knocked and hollered their presence, but got no response. Only then did the officers enter the house. The noise was so loud inside that the officers had to raise their voices to speak to each other. The officers went down stairs to find the resident of the home. Having failed to find anything in the basement (except for wall to wall marijuana plants), the officers went upstairs continuing to search for the occupant of the home who could turn the music down. *Id.* Upstairs the officers found a man that was passed out, and a stereo that was the

source of the noise. The stereo was turned down, and the man was awakened, given his Miranda warnings, and the man signed a consent to search the home. *Id.* at 1510.

In a fact specific holding, the Sixth Circuit found that the entry into the house and the search for the occupant of the house was not unreasonable. The appeals court found it extremely significant that the officers' actions were primarily directed at abating a loud noise rather than enforcing the law. *Id.* at 1512, 1523. The court was *not* fashioning a broad nuisance abatement exception to the general rule that warrantless entries into homes are generally unreasonable. *Id.* at 1525 n.11. The exception would presumably be limited to cases where there was an immediate, ongoing, and highly objectionable nuisance. *Id.*

Unlike *Rohrig*, where there were several complaints of noise, noise could be heard a block away, and nobody responded when the officers knocked on the door, in the present case there had not been a complaint of noise, the Officers in the present case made no mention of noise in their reports, and as the officers arrived, two of the three people outside on a deck left, and the Officers had the opportunity to speak to a resident of the house before entering. Most significantly, the Officers here did not enter the house to abate a nuisance. There was no nuisance. The Officers entered the house to investigate criminal activity.

Finally, it has been contended that the multiple entries and searches of the home were justified because of the threat to public safety if the juveniles left the house in cars under the influence of alcohol. However, the Officers who were at the scene and were aware of the particular circumstances confronting them, testified that they were not confronting a life-threatening situation or an emergency, and

that there was no imminent risk of harm to anybody. It is also significant that the one individual that the officers observed drinking that night was observed by Officer Paul fleeing the residence, but based on the particular circumstances he observed, Officer Paul did not find it necessary to stop him. Based on the facts and circumstances available to the officers, there was not a significant exigency premised on public safety that would justify a warrantless entry and search of the home. The court of appeals should not have substituted its judgment for that of the Officers who were actually at the scene.

If these officers are entitled to immunity based on the particular circumstances that they faced, it is almost impossible to imagine a scenario in which any officer would be precluded from entering and searching a home without a warrant upon a finding of probable cause that a minor was drinking in a home. What the appeals court essentially did is create a blanket exception to the warrant clause for cases in which there is probable cause to believe that a minor is drinking in a house. This Court has previously rejected a comparable approach. In *Richards v. Wisconsin*, 520 U.S. 385, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997), the Court refused to adopt a blanket exception to the knock and announce requirement when executing a search warrant in felony drug investigations. Although the Court recognized that felony drug investigations frequently involve potential threats of physical violence and the potential for the destruction of evidence, the Court determined that officers must have a reasonable suspicion of such an exigency under the particular circumstances to justify a no-knock search. *Id.* at 394.

In rejecting a blanket exception to the knock-and-announce requirement, the Court specifically noted that a

no-knock entry is less intrusive than a warrantless search. *Id.* at 393. The appeals court did not rely on the particular circumstances confronting the officers to justify the warrantless entry and search, nor did the Officers provide facts that would support a reasonable suspicion of an exigency under the particular circumstances of this case. Rather, the appeals court could only refer to the general dangers associated with underage drinking. As such, the appeals court was essentially recognizing a blanket exception to the warrant requirement for searches of homes in cases in which officers have probable cause to believe that a minor is drinking within the home. The Court has already deemed unreasonable a blanket exception authorizing a lesser intrusion in cases involving a more serious criminal offense.

The warrantless entries and searches of Mr. Radloff's home were presumptively unreasonable. There was no exigency justifying the warrantless entries and searches of his house and therefore the Officers cannot bear their heavy of burden of justifying their warrantless entry and search of Mr. Radloff's residence. It is clear that the warrantless entries and searches of Mr. Radloff's home violated Mr. Radloff's constitutional rights.

Review of the Court of Appeals decision through a writ of certiorari will yield a result for these litigants and others that conforms to the teachings of the Supreme Court and that preserves fundamental protections afforded by the Fourth Amendment.

Respectfully submitted,

TIMOTHY S. WHITE

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Steven Radloff

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-3493NI

Steven Radloff, Appellant, v. City of Oelwein, Iowa; Jesse Paul; John Reege; and Curt Wilkinson, Appellees.	* * * * * * * * * *	C02-2029 On Appeal from the United States District Court for the Northern District of Iowa.

Submitted: April 12, 2004

Filed: August 17, 2004

Before LOKEN, Chief Judge, RICHARD S. ARNOLD and FAGG, Circuit Judges.

(Filed Sep. 13, 2004)

RICHARD S. ARNOLD, Circuit Judge.

Steven Radloff appeals the District Court's[1] grant of summary judgment on qualified-immunity grounds in favor of Officers Jessie Paul, John Reege, and Curt Wilkinson on

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[1] The Hon. John A. Jarvey, Chief United States Magistrate Judge for the Northern District of Iowa.

his unreasonable-entry-and-search claim. Mr. Radloff also alleges that the District Court abused its discretion when it denied his motion for a new trial. We find no error and affirm.

I.

Late in the evening on May 12, 2000, Officers Paul and Reege arrived at the home of Mr. Radloff after an unidentified caller told the Oelwein Police Department that juveniles were consuming alcohol at that address. When the two officers arrived at the Radloff home, they heard loud noises coming from the home and observed about a dozen people standing on its back deck, which was visible from the street. Officer Paul then radioed Officer Wilkinson for assistance, directed Officer Reege to go to the front of the home, and approached the home's rear door by way of the back deck. As Officer Paul crossed the deck, he observed through a window a minor he recognized drinking a beer inside the home.

Mark Radloff, the twenty-year-old son of Mr. Radloff, met Officer Paul at the back door. After Officer Paul informed Mark that he had received a report of underage drinking in the home, Mark told him that he could not enter the home without a warrant. Officer Paul then told Mark that he did not need a warrant, and he entered the home.

At this point, another Radloff son, Mike, informed Mr. Radloff, who was in his bedroom, that the police had entered their home. Shortly thereafter, Officer Paul opened Mr. Radloff's bedroom door as part of his search, saw Mr. and Mrs. Radloff in the room, and then closed the door and proceeded to search other rooms. Thereafter, Mr.

Radloff left his bedroom and began asking Officer Paul about his presence in the home and yelling obscenities at him. Officer Paul did not respond to the questions or obscenities and continued his search.

Officer Reege eventually entered the home to assist Officer Paul in conducting the search, and both limited their search to spaces large enough to conceal a person. In the meantime, Officer Wilkinson arrived at the home and gathered together juveniles who were attempting to leave.

After Officer Paul found two juveniles hiding in the home's basement, he informed Mr. Radloff that the police would contact him if any charges were filed against him. Again, Mr. Radloff yelled obscenities at Officer Paul and stated that the police needed a warrant to enter his home. Officer Paul then came out of the home and met with Officers Reege and Wilkinson in the front yard.

After speaking with Officer Wilkinson, Officer Paul learned that a juvenile had reentered the home during the search. Officers Paul and Wilkinson then returned to the front door and asked for the juvenile to leave the home. Mr. Radloff confronted the officers at the front door, repeated that they could not enter without a warrant, and stated that the juvenile was not inside the home. Again, the officers told Mr. Radloff that they did not need a warrant, reentered the home, and subsequently located the juvenile.

Throughout this second entry into the home, Mr. Radloff continued to yell obscenities at the officers. Before leaving the home, Officer Paul placed Mr. Radloff under arrest for interference, resisting arrest, and supplying alcohol to minors. After a brief struggle, Officer Paul handcuffed Mr. Radloff and carried him to a patrol car.

All charges against Mr. Radloff were eventually dropped except the charge of supplying alcohol to minors, to which he pleaded guilty. In May 2002, Mr. Radloff filed a 42 U.S.C. § 1983 action against Officers Paul, Reege, and Wilkinson, and the City of Oelwein, Iowa, alleging that the officers violated his Fourth Amendment rights by unreasonably entering and searching his home without a warrant and by using excessive force to arrest him. Mr. Radloff also raised an Iowa state law assault-and-battery claim against the officers. Before trial, the District Court granted summary judgment in favor of the officers on the unreasonable-entry-and-search claim on qualified-immunity grounds. The District Court also granted summary judgment in favor of the City on all claims against it on the grounds that Mr. Radloff failed to raise a genuine issue of material fact as to whether the City had a policy or custom of tolerating inappropriate police conduct. Prior to trial, Mr. Radloff dropped his claims against Officer Reege. Because both the assault-and-battery claim and excessive-force claim involved the same question of fact, only the question of whether Officers Paul and Wilkinson used excessive force was submitted to the jury. Appendix at 426. On this issue, the jury returned a verdict in favor of the officers.

II.

On appeal, Mr. Radloff raises two issues. First, he alleges that the District Court erred in granting summary judgment in favor of the three officers and the City on his unreasonable-entry-and-search claim because no exigency existed. Second, he alleges that the District Court abused its discretion when it denied his motion for a new trial. We

find no error in either decision of the District Court and affirm.

We review the grant of summary judgment on the unreasonable-entry-and-search claim *de novo*. *Young v. Harrison,* 284 F.3d 863, 866 (8th Cir. 2002). Summary judgment is proper when, viewing the facts most favorably to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). With respect to the District Court's determination that qualified immunity shielded the officers from liability, we review *de novo* whether the officers had an objectively reasonable belief that their conduct did not violate Mr. Radloff's clearly established statutory or constitutional rights. *Winters v. Adams,* 254 F.3d 758, 766 (8th Cir. 2001).

"[T]o withstand a motion for summary judgment on qualified-immunity grounds, a plaintiff must (1) assert a violation of a constitutional right; (2) demonstrate that the alleged right is clearly established; and (3) raise a genuine issue of fact as to whether the government official knew or should have known that his alleged conduct violated this clearly established right." *Habiger v. City of Fargo,* 80 F.3d 289, 295 (8th Cir. 1996). Mr. Radloff alleges that the officers violated his Fourth Amendment right not to be subjected to a warrantless entry and search of his home, that this is a clearly established right, and that a reasonable officer would have known that the officers' conduct violated this right.

Could reasonable officers have believed that this entry in the Radloff home was supported by exigent circumstances? We think the answer is yes. An exception to the warrant requirement permits a law enforcement officer to

enter and search a home if he acts with probable cause and exigent circumstances exist. *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). Probable cause exists when it is reasonable to believe contraband or illegal activity will be found in a particular place. *Kleinholz v. United States,* 339 F.3d 674, 676 (8th Cir. 2003). Exigent circumstances, although typically limited to situations where a life is threatened, a suspect's escape is imminent, or evidence is about to be destroyed, *United States v. Ball,* 90 F.3d 260, 263 (8th Cir. 1996), may also be found when there is a compelling need for official action and there is no time to secure a warrant. *Michigan v. Tyler,* 436 U.S. 499, 509 (1978). A determination of whether a legal warrantless entry occurred focuses on whether a law enforcement officer acted with a reasonable belief that probable cause and exigent circumstances existed, not on whether either actually existed. *Anderson,* 483 U.S. at 641.

The warrantless entry into the Radloff home comports with the exception to the warrant requirement, and it was therefore legal. Probable cause existed because it was reasonable for the officers to believe illegal activity was taking place after Officer Paul observed a minor he recognized drinking a beer inside the home. See *State v. Jangala,* 961 P.2d 246 (Or. App. 1998) (holding that a law enforcement officer had probable cause to believe the crime of furnishing alcohol to a minor was taking place after the officer observed a group of people who appeared to be minors drinking beer inside a home). Exigent circumstances existed both because of the loud noise created by the party and because of the threat to public safety if the juveniles left the house in cars while under the influence of alcohol. *Michigan,* 436 U.S. at 509. It would have been unreasonable to subject the neighbors to the loud

noise or to require the officers to quarantine the juveniles' cars during the period of time it would have taken to obtain a warrant. Thus, summary judgment on qualified-immunity grounds was proper because we think the officers acted on a reasonable belief that probable cause and exigent circumstances existed.

As to the grant of summary judgment for the City, to impose municipal liability under 42 U.S.C. § 1983, Mr. Radloff bore the burden of presenting evidence that warrantless entries and searches were either an official policy or a widespread custom or practice of the City. *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998). Mr. Radloff did not present sufficient evidence to raise a material issue of fact as to whether the officers acted in accordance with an official policy or widespread custom or practice of the City. Therefore, summary judgment for the City on this issue was proper.

III.

We review the denial of a motion for a new trial for clear abuse of discretion. *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 495 (8th Cir. 2002). Mr. Radloff raises two arguments to support his claim that he is entitled to a new trial.

First, Mr. Radloff alleges that he was prejudiced by the admission of a police-activity log that contained an entry recounting his arrest the night of the search. The police-activity log states that Mr. Radloff was arrested for interference, resisting arrest, and supplying alcohol to minors. Mr. Radloff argues that admitting this document effectively negated his claim that the officers were not

entitled to use force to arrest him. A motion for a new trial based on the erroneous admission of evidence should not be granted unless the evidentiary ruling was so prejudicial that a new trial would likely produce a different outcome. *Bevan v. Honeywell, Inc.*, 118 F.3d 603, 612 (8th Cir. 1997). We find no error in the District Court's decision to admit this police-activity log as a record kept in the ordinary course of the Police Department's business. Appendix at 327. Thus, we do not reach Mr. Radloff's argument that its admission improperly prejudiced him. The denial of Mr. Radloff's motion for a new trial on this issue is affirmed.

Mr. Radloff's second argument for a new trial is based on alleged prejudice he suffered because of the District Court's refusal to allow the jury to be instructed that the officers illegally entered and searched his home. He states that the alleged illegality of the entry and search is a factor the jury should have considered in assessing the reasonableness of the force used to arrest him. A district court's decision not to include a jury instruction will be sustained if the instruction is not supported by evidence. *Hoselton v. Metz Baking Co.*, 48 F.3d 1056, 1063 (8th Cir. 1995). As we discussed earlier in this opinion, the officers reasonably believed that their entry and search was legal. In any event, excessive force would be actionable whether or not the entry and search were legal, so we do not see the relevance of an instruction on such a subject.

The officers claim it was error for the District Court not to grant their motion for judgment as a matter of law on the excessive-force claim. The jury returned a verdict in favor of the officers on this claim, so this issue is moot.

For these reasons, the District Court's judgment is affirmed.

A TRUE COPY OF THE
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GANS, CLERK UNITED
STATES COURT OF
APPEALS FOR THE
EIGHTH CIRCUIT

BY: /s/ Michael E. Gans

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 03-3493

Steven Radloff, Appellant, vs. City of Oelwein, Iowa; Jesse Paul; John Reege; and Curt Wilkinson, Appellees.	*	C02-2029 Appeal from the United States District Court for the Northern District of Iowa

JUDGMENT

(Filed Sep. 13, 2004)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

August 17, 2004

Order Entered in Accordance with Opinion:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BY: /s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA EASTERN DIVISION

STEVEN RADLOFF,

Plaintiff,

vs.

CITY OF OELWEIN, JESSE PAUL, JOHN REEGE, and CURT WILKINSON,

Defendants.

No. C02-2029

ORDER

(Filed May 19, 2003)

This matter comes before the court pursuant to the defendant's April 1, 2003 motion for summary judgment (docket number 10) and the plaintiff's April 1, 2003 motion for partial summary judgment (docket number 14). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(c). For the reasons set forth below, the defendant's motion is granted in part and denied in part and the plaintiff's motion is denied.

In this case, the plaintiff, Steve Radloff, alleges that the defendants, Officers Jesse Paul, John Reege, and Curt Wilkinson, violated his Fourth Amendment rights when they unreasonably entered and searched his home without a warrant and used excessive force during an unlawful seizure and that the policies and/or customs of the City of Oelwein were a cause of this constitutional violation. The plaintiff also raises a state law assault and battery claim against the officers. The defendants move for summary

judgment arguing: (1) they are entitled to qualified immunity with respect to the plaintiff's claims under 42 U.S.C. § 1983; (2) the entry and search of the plaintiff's home were based on probable cause and exigent circumstances; (3) the amount of force used to seize and arrest the plaintiff was objectively reasonable under the circumstances; (4) there is no evidence that the City of Oelwein had any policy or custom which could serve as the basis for imposition of liability under 42 U.S.C. § 1983; and (5) the City of Oelwein is entitled to summary judgment with respect to the plaintiff's claims for punitive damages. The plaintiff moves for partial summary judgment arguing: (1) there was no basis for the warrantless entry into the plaintiff's home; and (2) the excessive force used by Officers Paul and Wilkinson against the plaintiff was unreasonable under the circumstances.

Summary Judgment: The Standard

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. *Kegel v. Runnels,* 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P.* 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." *Noll v. Petrovsky,* 828 F.2d 461, 462 (8th Cir. 1987) (citing *Celotex Corp. v. Catrett,* 477

U.S. 317 (1986)). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" *Metge v. Baehler,* 762 F.2d 621, 625 (8th Cir. 1985) (quoting *Impro Prod., Inc. v. Herrick,* 715 F.2d 1267, 1272 (8th Cir. 1983)). In applying these standards, the court must give the nonmoving party the benefit of all reasonable inferences to be drawn from the evidence. *Krause v. Perryman,* 827 F.2d 346, 350 (8th Cir. 1987).

Statement of Material Facts

At all material times, the plaintiff was a resident of Oelwein in Fayette County, Iowa. At all material times, defendants Jesse Paul, Jon Reege and Curt Wilkinson were employed by defendant City of Oelwein as police officers. At the time of the incident on May 12, 2000, the plaintiff lived with his wife and his two sons.

On Friday, May 12, 2000, the plaintiff and his wife learned that their younger son Mark was planning to have some friends come to their house that evening. The plaintiff understood that there would be alcohol at the party and knew that Mark and several of his friends were underage. The plaintiff and his wife kept beer in a refrigerator downstairs and routinely allowed Mark to drink at home.

After having two beers earlier that afternoon at some local bars, the plaintiff resumed drinking beer at his home around 8:00 or 8:30 that night. Mark's guests began to arrive around 8:00 p.m. Several of the guests congregated on the deck in the back of the house.

That evening, Officers Paul and Wilkinson were on duty as patrolmen and Officer Reege was on duty as a probationary officer undergoing field training under the supervision of Officer Wilkinson. At 11:27 p.m., the Oelwein Police Department received a complaint from an unidentified female that there were juveniles consuming alcohol at or in the area of the plaintiff's residence. After receiving this complaint, the police dispatcher radioed the information to Officers Paul, Wilkinson, and Reege, the only officers on duty that night. Upon receipt of the call, Officers Paul and Reege proceeded to the plaintiff's residence and arrived there at 11:40 p.m. They parked the car away from the residence and walked directly north to observe what was going on. Officer Paul observed about a half-dozen to a dozen people on the deck and noted that they were "pretty loud." At 11:45, Officer Paul called for assistance. Officer Wilkinson responded and arrived at the scene at 11:48 p.m.

As Officers Paul and Reege started to approach the deck, they could see beer bottles and cans on the railing, however, they could not recall seeing any of the people drinking the beer or with beer in their hands. As the officers approached, some of the people on the deck ran away and some ran into the house. Officer Paul sent Officer Reege around to the front of the house and he then proceeded to go onto the deck. Officer Paul saw Brian Goede, whom he knew to be a minor, drinking beer inside the house through the kitchen window. Mark Radloff had approximately 10 beers that evening but Mike Radloff, the plaintiff's older son, had not been drinking. Mark told Officer Paul that he could not enter the house without a warrant but Officer Paul responded that he could and he

proceeded to enter the house through the back door into the kitchen.

When the plaintiff learned that the police had arrived, he went into his bedroom. When Mike Radloff realized the police were in the house, he went into his parents' bedroom to inform them. The plaintiff and his wife told Mike to deal with the police while they remained in their bedroom.

As Officer Paul walked towards the living room, he heard a noise in the garage, opened the door, and saw Brian Goede run out of the garage. Officer Paul then went back into the living room and down the hallway. As he proceeded down the hallway, Officer Paul opened a closed door and found the plaintiff and his wife sitting on their bed fully clothed with the lights off. The plaintiff had consumed approximately six to eight beers that evening. The plaintiff asked Officer Paul what he was doing in the house, but Officer Paul did not answer. Officer Paul proceeded to search the bedrooms and closets with his flashlight. He then headed into the living room and basement with the plaintiff following him. While the plaintiff was following Officer Paul around the house, he was using obscenities and told him "to get his fat a* * out of our house" and to get his "f* * *ing a* * out of our house." Officer Paul found another juvenile in the basement and brought him upstairs into the living room. When Officer Paul came upstairs, he informed the plaintiff that they would contact him at a later date if any charges would be filed. The plaintiff and his son Mark were in the living room yelling and swearing at Officer Paul while Mike was trying to calm them down. Officer Paul then went outside.

In the meantime, Officer Wilkinson was attending to the people in the backyard. He brought the individuals from the backyard out to where his car was parked in front of the house. While he was doing this, Jessica Levendusky, a minor, left the group and went inside the house. Officer Wilkinson got identification from the people outside. He also asked the individuals about who purchased the alcohol but he does not recall what was said. Mark Radloff was speaking with Officer Reege about 20 feet away from the front door.

Officers Paul and Wilkinson returned to the front door and asked for Jessica Levendusky to come outside. The plaintiff told Officer Wilkinson that he knew the law and the officers could not enter his home and continued yelling obscenities. Officer Wilkinson responded, "We don't need a warrant, we're investigating a crime, and she needs to come outside." Mark Radloff stepped in front of them and told them they were not coming back inside. When the officers were told that Jessica Levendusky was not inside, Officer Paul told Mark that if he did not move out of the way and let him in the house, he would be arrested. Mark moved out of the way and Officers Paul and Wilkinson reentered the house. Jessica Levendusky was eventually produced.

Once the officers were back inside the house, the plaintiff again yelled at the officers using obscenities and told them to get out of his house. The plaintiff was "telling them you f* * *ing pigs can't be in this house without a search warrant" and "just kept arguing with them" and threatened to sue. The plaintiff then pointed to the door and told Officer Paul "to get the f* * * out of our house" and "to get his fat a* * out of my house."

At that point, Officer Paul said "that's it" and grabbed the plaintiff's right wrist, swung him around and threw him headfirst into a loveseat. Officer Paul put his knee onto the plaintiff's back while holding his right arm. Officer Wilkinson then came over to pull the plaintiff's left arm from under his body so he could be handcuffed. The plaintiff told Officer Paul that he was breaking his back and the plaintiff's wife and sons were telling the officers they were hurting him but the officers continued trying to handcuff him. The officers picked the plaintiff up and walked him outside the house and to the patrol car. When they got to the patrol car, the plaintiff told the officers that he was not getting in and planted his feet to resist. Officer Paul then lowered the plaintiff's head and pushed him into the back seat. The officers never drew weapons or had anything in their hands during their search of the house and arrest of the plaintiff.

At 12:01 a.m. on May 13, 2000, Officer Paul reported that he had the plaintiff in custody for interference, resisting arrest, and supplying alcohol to minors. While the plaintiff sat in the patrol car, the officers proceeded to record license numbers of cars in the vicinity and reported those numbers by police radio at 12:14 a.m. Officers Paul and Reege transported the plaintiff to the city jail where he was held until 1:37 a.m.

The plaintiff entered a plea of guilty to a charge of supplying alcohol to minors. Three individuals were charged with possession of alcohol under the legal age. The plaintiff alleges that he suffered permanent injury to his neck as a result of the incident on May 12, 2000.

Conclusions of Law

Qualified Immunity

A government official who performs discretionary functions is protected from suit under the doctrine of qualified immunity as long as the official's conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982) (citations omitted). In order to lose qualified immunity, a state official must violate a person's clearly established constitutional rights. *Brown v. Nix,* 33 F.3d 951, 953 (8th Cir. 1994) (quoting *Mahers v. Harper,* 12 F.3d 783, 785 (8th Cir. 1993)). The contours of a clearly established right must be sufficiently clear that a reasonable official would understand what conduct violates that right. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). The test "focuses on the objective legal reasonableness of an official's acts." *Harlow v. Fitzgerald,* 457 U.S. at 819.

For the law to be clearly established, it is only necessary that the unlawfulness of the official's act be apparent in light of pre-existing law. *Anderson v. Creighton,* 483 U.S. at 640. The proper inquiry is an objective, fact-specific question determined by examining the facts at issue under clearly established law at the time. *Sellers By and Through Sellers v. Baer,* 28 F.3d 895, 899 (8th Cir. 1994) (citing *Anderson v. Creighton,* 483 U.S. at 641)). The Eighth Circuit Court of Appeals has made clear that the appropriate level of inquiry focuses on the factual circumstance presented to the official at the time of his actions. *See, e.g., id.* at 900.

To withstand a motion for summary judgment on the basis of qualified immunity, a plaintiff must:

> (1) assert a violation of a constitutional right; (2) demonstrate that the alleged right is clearly established; and (3) raise a genuine issue of fact as to whether the official would have known that his alleged conduct would have violated plaintiff's clearly established right.

Habiger v. City of Fargo, 80 F.3d 289, 295 (8th Cir. 1996) (citing *Foulks v. Cole County, Mo.,* 991 F.2d 454, 456 (8th Cir. 1993)). A court must generally view the facts in a qualified immunity claim in the light most favorable to the party asserting the injury. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). When a defendant asserts qualified immunity, the plaintiff has the burden to show that a material fact or question of law precludes summary judgment. *Yellow Horse v. Pennington County,* 225 F.3d 923, 927 (8th Cir. 2000). Once it is determined that the relevant predicate facts are not in dispute, the question of whether an officer's conduct violated a clearly established right becomes a question of law. *Pace v. City of Des Moines, Iowa,* 201 F.3d 1050, 1056 (8th Cir. 2000). "The conduct was either 'reasonabl[e] under settled law in the circumstances' or it was not, and this is a determination of law that should be made at 'the earliest possible stage in litigation.'" *Id.* (citing *Hunter v. Bryant,* 502 U.S. 224, 228 (1991)). If there are disputes concerning predicate facts material to the qualified immunity determination, summary judgment is not appropriate. *Greiner v. City of Champlin,* 27 F.3d 1346, 1352 (8th Cir. 1994) (citations omitted).

Unlawful Entry and Search

The Supreme Court has recognized as "a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively

unreasonable." *Payton v. New York,* 445 U.S. 573, 586 (1980). "[A] search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show . . . the presence of 'exigent circumstances.'" *Coolidge v. New Hampshire,* 403 U.S. 443, 474-75 (1971). Exceptions to the warrant requirement are few and the police bear a heavy burden when attempting to demonstrate an urgent need that may justify warrantless searches or arrests. *Welsh v. Wisconsin,* 466 U.S. 740, 749-50 (1984) (internal citation omitted).

The officers argue that they had probable cause to enter the house and also that exigent circumstances existed. The question in this case is not whether there were actual probable cause and exigent circumstances but whether the officers could reasonably have thought so. *See Anderson v. Creighton,* 483 U.S. at 641. "[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful-should not be held personally liable. The same is true of their conclusions regarding exigent circumstances." *Id.* (citation omitted).

The court finds that the officers reasonably could have believed that they had probable cause to enter the house without a warrant based upon their observations and knowledge. Officer Paul saw an individual he knew to be a minor drinking a beer in the kitchen and he also observed several other individuals run away or into the house after the officers arrived. Probable cause does not require "an actual showing of [criminal] activity." *Illinois v. Gates,* 462 U.S. 213, 244 n. 13 (1983). The qualified immunity determination depends on an assessment of what an objectively

reasonable police officer could believe under governing law and the factual circumstances. *See Anderson v. Creighton,* 483 U.S. at 641. The plaintiff has not raised a genuine issue of fact as to whether the officers would have known their conduct would have violated the plaintiff's clearly established rights.

With probable cause to believe that there was underage drinking inside the house, the police were permitted to enter the plaintiff's residence if one or more of the well-delineated emergency exceptions to the warrant requirement applied. The defendants argue that exigent circumstances existed, specifically, destruction of evidence and the dangers of underage drinking. The exigent circumstances exception extends to situations in which evidence is about to be destroyed. *See United States v. Pierson,* 219 F.3d 803, 805-06 (8th Cir. 2000); *United States v. Ball,* 90 F.3d 260, 263 (8th Cir. 1996). In addition, dangerous situations in which safety is threatened is a well identified exigency. *See Michigan v. Tyler,* 436 U.S. 499, 509-10 (1978); *United States v. Boettger,* 71 F.3d 1410, 1415 (8th Cir. 1995).

The officers could have reasonably believed that exigent circumstances existed in this case to enter the house. The Supreme Court has noted its "hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue . . . when the underlying offense for which there is probable cause to arrest is relatively minor." *Welsh v. Wisconsin,* 466 U.S. at 750. "When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate." *Id.* The

Supreme Court held in *Welsh* "that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." *Id.* at 753. However, the Court declined to say that there could be no warrantless home arrests for a misdemeanor. *Id.* at 749. "Because we conclude that, in the circumstances presented by this case, there were no exigent circumstances sufficient to justify a warrantless home entry, we have no occasion to consider whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses." *Id.* at 749 n. 11.

Different jurisdictions interpreting the exigent circumstances exception in light of *Welsh* in the context of an underage drinking party have reached conflicting conclusions. Some courts have found that the warrantless entry of a home during a teenage drinking party was justified where the police knew the evidence could be easily destroyed and the partygoers were aware of police presence. *See, e.g., State v. Jangala,* 961 P.2d 246, 247-48 (Or. App. 1998). Other courts have held that a warrantless entry of a home to make arrests for consumption of alcohol by minors was not permitted by exigent circumstances because the suspected offense was a nonviolent misdemeanor. *See, e.g., People v. Olson,* 444 N.E.2d 1147, 1150 (Ill. App. 1983).

Under the circumstances of this case, the officers are entitled to qualified immunity on the plaintiff's claim of unreasonable entry and search of the house. It was not clearly established law that an officer could not enter a house where there were known minors drinking alcohol inside. The officers saw minors drinking inside the house and also saw some run into the house after they had

arrived. An objectively reasonable officer under such circumstances could have concluded that once police presence was known, the partygoers would flee and evidence would be destroyed or concealed if the officers waited for a warrant. The officers also could have found from their training and experience that the threat to the lives of the juveniles and others was great after a night of underage drinking. In fact, the *Welsh* court found that "the prevention of drunken driving" may be "of major concern to the States." *Welsh v. Wisconsin,* 466 U.S. at 754 n. 14. It was not clearly established law that when known minors are consuming alcohol, officers could not go into the residence to apprehend them or to determine the source of the alcohol and the plaintiff is unable to point to any cases that show it was clearly established. This court cannot conclude that only a "plainly incompetent" policeman would have thought the entry and subsequent search and arrest were permissible at the time. *See Malley v. Briggs,* 475 U.S. 335, 341 (1986). An objectively reasonable police officer could have believed that his entry into the house was lawful given the circumstances and the officers are therefore entitled to qualified immunity on this claim.

It should also be pointed out that after entering the house, the officers checked the bedrooms and closets for minors drinking alcohol. Only places where minors could be hiding were searched. The officers needed to account for those present who could be in danger or who could potentially destroy evidence. The subsequent search was limited in time and scope and, therefore, was permissible.

To the extent the plaintiff claims that the officers arrested him without probable cause, his claim must fail. Clearly, being arrested without probable cause would violate the Fourth Amendment, and the Eighth Circuit has

squarely held that there is "a clearly established right under the Fourth Amendment not to be arrested unless there was probable cause for [the] arrest." *Habiger v. City of Fargo,* 80 F.3d 289, 295 (8th Cir. 1996). However, the Eighth Circuit has also held that "'where law enforcement officers have made an arrest, the resulting conviction is a defense to a § 1983 action asserting that the arrest was made without probable cause.'" *Malady v. Crunk,* 902 F.2d 10, 11-12 (8th Cir. 1990) (quoting *Cameron v. Fogarty,* 806 F.2d 380, 389 (2d Cir. 1986)). In this case, the plaintiff pleaded guilty to supplying alcohol to minors and therefore, his § 1983 action regarding lack of probable cause for arrest is precluded.

Excessive Force

The plaintiff also claims the officers used excessive force against him during his arrest. When an "excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person." *Graham v. Connor,* 490 U.S. 386, 394 (1989). The proper test for evaluating an excessive force claim is, therefore, one of objective reasonableness. *See id.* at 397.

This objective reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. In applying the objective reasonableness test, the Supreme

Court has cautioned that, "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," is constitutionally unreasonable. *Id.* at 396 (quotation omitted). Rather, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97. When an arrestee resists, some use of force by the police is reasonable. *Foster v. Metro. Airports Comm'n,* 914 F.2d 1076, 1082 (8th Cir. 1990).

The officers are not entitled to qualified immunity on the plaintiff's claim of excessive force. The right against unreasonable seizure of one's person is clearly established law. There is a factual dispute regarding whether the plaintiff resisted the arrest. The plaintiff claims he never resisted arrest and never used any type of physical resistance against the officers. The officers assert that the plaintiff did resist arrest. It is clear that threats of litigation, profanity or other oblique, offensive language alone is not grounds for the officers to use force against the plaintiff to arrest him. If the plaintiff's conduct was nothing more than verbal outbursts, there is no qualified immunity available because the unreasonableness of applying force against the plaintiff would be apparent to the reasonably competent police officer. A genuine issue of material fact exists as to the reasonableness of the force used by the officers against the plaintiff. Accordingly, the officers are not entitled to qualified immunity on the plaintiff's excessive force claim.

Municipal Liability

The Eighth Circuit Court of Appeals has observed that "a plaintiff seeking to impose [municipal] liability is required to identify either an official policy or a widespread custom or practice that caused the plaintiff's injury." *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998) (citations omitted). The purpose of this is to ensure that a municipality is exposed to liability only for constitutional violations "'resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality.'" *Id.* (quoting *Bd. of County Comm'rs of Bryan County, Okl. v. Brown*, 520 U.S. 397, 403 (1997)). The plaintiff must prove that the alleged policy "was the moving force behind the constitutional violation." *Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 799 (8th Cir. 1998) (quoting *Jane Doe A. v. Special Sch. Dist.*, 901 F.2d 642, 646 (8th Cir. 1990)).

Where official policy is lacking, municipal liability may be established under 42 U.S.C. § 1983 "through proof that the alleged misconduct was so pervasive among the non-policy making employees of the municipality 'as to constitute a "custom or usage" with the force of law.'" *McGautha v. Jackson County, Mo., Collections Dept.*, 36 F.3d 53, 56 (8th Cir. 1994) (quoting *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690-91 (1978)). To prevail under this theory, the plaintiff must show "that city officials had knowledge of prior incidents of police misconduct and deliberately failed to take remedial action." *Rogers v. City of Little Rock, Ark.*, 152 F.3d at 799 (citations omitted).

The court finds that the plaintiff has not shown that any of his constitutional injuries were the result of an

official policy or widespread custom of the city of Oelwein for which it may held liable. Even viewing the facts in a light most favorable to the plaintiff, he has made no showing that the officers were acting pursuant to any express city policy or some unofficial custom. The affidavits provided by the plaintiff are insufficient to raise a genuine issue of material fact as to whether the city has a policy or custom tolerating inappropriate police behavior. The plaintiff's mere allegations fail to state a claim for which relief can be granted under § 1983 against the city of Oelwein. The defendants' motion for summary judgment on the plaintiff's claim against the city of Oelwein is granted.

Punitive Damages

The court agrees with the parties that an award of punitive damages is not available against the city of Oelwein under 42 U.S.C. § 1983. "[A] municipality is immune from punitive damages under 42 U.S.C. § 1983." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Therefore, the court will grant the defendant's motion for summary judgment on the plaintiff's claim for punitive damages against the city of Oelwein.

Upon the foregoing,

IT IS ORDERED that the defendant's motion for summary judgment (docket number 10) is granted in part and denied in part and the plaintiff's motion for summary judgment (docket number 14) is denied.

May 19, 2003.

/s/ John A. Jarvey
JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT

Copies mailed on 5/19/03
the counsel of record or pro se
parties as shown on the docket sheet.

/s/ [Illegible]
Deputy Clerk